

# Denver Law Review

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Volume 66  
Issue 4 *Tenth Circuit Surveys*

Article 17

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February 2021

## Constitutional Law

Denver University Law Review

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### Recommended Citation

Denver University Law Review, Constitutional Law, 66 Denv. U. L. Rev. 695 (1989).

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## CONSTITUTIONAL LAW

*United States v. Reedy*, 845 F.2d 239

Defendant Reedy appeals the district court's denial of his motion to dismiss his indictment on grounds that 18 U.S.C. § 2251(a) is unconstitutional because of overbreadth and vagueness. Affirmed.

In July, 1985, defendant took nineteen photographs of his step-daughter, age nine, and her friend, age 11. The photographs were taken while the girls were naked and posing in such a manner as to expose their genitals. The defendant sent the film to a processing lab, whereupon lab employees contacted the police. Defendant now appeals on grounds that the Child Protection Act is impermissibly overbroad, in violation of the first amendment, and vague, in violation of the fifth amendment.

This court holds that the overbreadth doctrine, an exception to the general rule that one cannot challenge the constitutionality of a statute as applied to third parties, is not operative in this case. The statute in question does not reach beyond the unprotected activity of child pornography. The statutory language is not unconstitutionally vague, because it provides sufficient warning as to the proscribed conduct.

*Vandehoef v. National Transportation Safety Board*, 850 F.2d 629

The Federal Aviation Administration (FAA) suspended plaintiff's commercial pilot certificate, (Lighter than Air Free Balloon rating), for 90 days due to violations of the FAA regulations relating to minimum safe altitudes for flight and for careless or reckless operation of his balloon. Plaintiff appealed to the National Transportation Safety Board (NTSB). His appeal was heard by an administrative law judge (ALJ), who reduced the suspension to 30 days. The decision of the ALJ was appealed to the NTSB, which reinstated the 90-day suspension. The plaintiff appealed for a review of the NTSB action. He conceded that the findings of the ALJ, which were adopted by the NTSB, were supported by substantial evidence. He urged as grounds for relief that section 91.79(b) of FAA regulations was unconstitutionally vague and that the ALJ failed to comply with the provisions of 49 C.F.R. § 821.42, which state that the credibility of witnesses should be included in the statement of findings. Since all witnesses testified to the same facts which were not actually in dispute, it was not necessary that the ALJ assess the credibility of each witness. The FAA regulation clearly provides parameters for operation and the words "except when necessary for takeoff or landing" are not vague. Affirmed.

*Pueblo Neighborhood Health Centers and Pacheco v. Losavio*, 847 F.2d 642

This appeal involves two lawsuits consolidated for trial, *Pueblo* and

*Pacheco*. The panel reviewed the district court's denial of the appellants' motions for summary judgment on qualified immunity grounds.

The plaintiffs in both lawsuits are patients who dispute the seizure, inspection, copying, and retention of medical records from two facilities operated by Pueblo Neighborhood Health Centers, Inc. (PNHC) in Pueblo, Colorado. Suspecting Medicaid fraud, Losavio (then state district attorney), other state officials and employees of the United States Department of Health and Human Services entered the two PNHC facilities and conducted searches and seizures pursuant to warrants issued. Medical records concerning the patient-plaintiffs and others were inspected and microfilmed.

Initially, the panel holds the district court's denial of the defendants' motions for summary judgment on qualified immunity grounds constitutes an appealable decision pursuant to 28 U.S.C. § 1291. Then, the district court failed to apply the proper standard in resolving the qualified immunity issue. An objective test is used to determine whether qualified immunity applies.

In *Pacheco*, the appellees claim that the search and seizure of PNHC medical records violated their right to privacy. However, the appellees did not meet their burden under the objective test, because they fail to cite precedent that demonstrated that appellants encroached on a clearly established privacy zone. The panel reverses the district court in *Pacheco*. Summary judgment should have been granted.

In *Pueblo*, appellees allege that the federal appellants acted under color of state law to abridge appellees' first, fourth, fifth, and fourteenth amendment rights when they participated in the search and seizure of PNHC records. The panel finds that the valid search warrant made it reasonable for appellants to believe that the search and seizure was lawful. Qualified immunity shields these appellants from fourth and fifth amendment claims.

Appellees needed more than conclusory, nonspecific allegations to overcome the motion for summary judgment. The panel remands the case to the district court for the limited purpose of determining if specific, nonconclusory evidence before the court when the summary judgment motion was made was sufficient to support the appellees' unconstitutional motive claim.

*Conaway v. Smith*, 853 F.2d 789

Appellant was an electrical inspector for Kansas City. He refused to approve a baseball field as operational because of dangerous electrical violations. Overruled by a supervisor, he filed a report criticizing the supervisor's order and was thereafter fired for insubordination. He filed suit claiming he was fired in retaliation for his criticisms. The district court granted summary judgment for the city.

The Tenth Circuit held appellant's criticism was protected speech under the first amendment. His speech was not motivated by personal

interest, but was primarily for the purpose of informing his superiors of improper and illegal conduct and was of public concern. The evidence indicated appellant's termination may have been partially motivated by his constitutionally protected speech. Reversed.

*United States v. Soto Hernandez*, 849 F.2d 1325

Defendant was convicted of possession of heroin with intent to distribute and actual distribution of heroin. Defendant argues that he was denied his sixth amendment right to effective assistance of counsel. He bases this on an allegation that a conflict of interest exists, arising out of his counsel's prior representation of, in an unrelated matter, the individual that defendant claims coerced him into committing the crime. He seeks a new trial on this ground. Judgment affirmed.

The Tenth Circuit held that no conflict of interest existed. Furthermore, it held that the lack of communication between the defendant and his counsel based on defendant's alleged distrust did not render the attorney's performance ineffective per se, especially since the alleged lack of confidence did not prevent defendant from talking to the attorney about the essentials of the defense.

*American Petrofina Company of Texas v. Nance*, 859 F.2d 840

Appellant members of the Oklahoma Tax Commission appeal the district court's finding that the 1984 amendments to the Uniform Disposition of Unclaimed Property Act (Act), Okla. Stat. Ann. tit. 60, sections 651-687 (1971), violate the supremacy clause of the United States Constitution, and that the Oklahoma amendments' scheme for the custodial taking of unclaimed property is preempted by federal common law. Affirmed.

The 1984 amendments require the plaintiffs to transfer proceeds from unlocated owners' mineral interests to the state tax commission where money is placed in the Abandoned Mineral Interest Revolving Fund. The money is invested to generate interest income for the state. After seven years, the money is deemed abandoned and is subject to the strictures of the Act. The statute fails because of the Supreme Court decision in *Texas v. New Jersey*, 379 U.S. 674 (1965), which limited that states' power to take custody of unclaimed property in order to ensure the free flow of commerce.

*United States v. Clark*, 847 F.2d 1467

Appellants Clark, an accountant, and Thibodeau, an attorney, appeal a district court order enforcing an Internal Revenue Service (I.R.S.) summons for the production of various documents pertaining to the tax liability of one of their clients. Clark and Thibodeau alleged the act of producing the documents would have testimonial aspects violative of the fifth amendment's prohibition against self incrimination, and that the documents were protected by the attorney-client privilege. The district

court found that the act of producing documents was not self incriminating, and issued an order which enforced and broadened the I.R.S.'s summons. Affirmed in part, reversed in part.

The court of appeals found that the requested documents would not have been privileged in the hands of Thibodeau's client, and because of this, Thibodeau could not use the attorney-client privilege to protect them. But the court of appeals did find that part of the district court's order which broadened the I.R.S.'s summons to cover all of the client's financial records to be impermissibly broad.

*Griess v. Colorado*, 841 F.2d 1042

Appellant was an inmate of the Colorado Department of Corrections. He brought a civil rights action, alleging that various defendants deprived him of equal protection and due process by failing to include the time he served prior to sentencing in the computation of "good time," as required by Colorado case law. Even though defendants stipulated that appellant was held for two months longer than he should have been due to error in the computation of "good time," the district court dismissed his case for damages on eleventh amendment immunity grounds. The Tenth Circuit affirmed, but held that the defendants who had been sued in their individual capacities were only qualifiedly immune from suit. The court found that appellant failed to clearly establish constitutional rights when the pre-sentence good time credit was withheld.

*Dickenson v. Quarberg*, 844 F.2d 1435

Appellants, Dickenson and Weaver, had been appointed as head jailer and administrative assistant to the former sheriff. The sheriff was defeated for re-election by appellee, Quarberg, who shortly discharged both appellants. They filed suit alleging violations of their constitutional rights under the first and fourteenth amendments, asserting that they were discharged because of their association with the former sheriff and that their terminations violated their due process rights. The district court granted defendant's motion for summary judgment.

The court of appeals affirmed the lower court's finding as to the allegations of violations of the appellants' property and liberty interests. However, the court held that it cannot be said that political party affiliation is an appropriate requirement for effective performance as a head jailer or administrative assistant. Since the appellee offered no sufficient justification for demanding political loyalty from the appellants, the court found a genuine issue of material fact as to the actual motivation of Quarberg in discharging the appellants. Therefore, the issue of motivation was remanded for determination by the district court.

*Rowley v. Board of Education*, 863 F.2d 39

Appellant Board of Education appeals the district court's order

granting appellee's motion for a preliminary injunction. Appellee sued for declaratory and injunctive relief under 42 U.S.C. § 1983 (1982) and 20 U.S.C. §§ 1681-1686 (1982) seeking to enjoin appellants from preventing him from participating in interscholastic volleyball competition solely because of his sex. Appellee alleges that the absolute prohibition on male participation violates his fourteenth amendment right to equal protection and his rights under Title IX. Reversed.

The Tenth Circuit concluded that the district court applied a test for this gender-based classification which was more stringent than was constitutionally required in its determination of appellee's likelihood of success on the merits of his equal protection claim.

*Brown v. Hartshorne Public School Dist. No. 1*, 864 F.2d 680

Appellant Brown filed a civil rights action against appellee school district under 42 U.S.C. § 2000e-5 (1982) (Title VII of the 1964 Civil Rights Act) and under 42 U.S.C. § 1983 (1982) after the school district had turned down her application for employment for ten straight years. Appellant alleges that appellee discriminated against her, and refused to hire her in the 1985-86 school year in retaliation for her previous suits. The district court granted the school district's motion for a summary judgment and dismissed Brown's entire complaint because she had not filed an EEOC charge for the 1985-86 school year. The district court failed to address Brown's § 1983 claim. Reversed.

The Tenth Circuit held that aside from appellant's claims for the 1985-86 school year, the district court ignored the appellant's discrimination claims made in 1984. The court also concluded that appellant's 1985-86 related claims would be properly before the district court if either of Brown's claims were true: That the school district's decision not to hire her for the 1985-86 school year was (1) in retaliation for her EEOC filing and (2) part of an ongoing pattern of discrimination. The court held Brown should have the opportunity to prove her allegations and the propriety of jurisdiction. Finally, the court found that the district court ignored Brown's § 1983 claim by dismissing her Title VII action. Claims under § 1983 and Title VII differ significantly in their statutes of limitations, exhaustion requirements, and available remedies. The court of appeals noted the district court should apply these differing standards to the separate causes of action in this case on remand.

*Milo v. Cushing Municipal Hospital*, 861 F.2d 1194

Appellant doctors alleged that the defendant-appellee hospital suspended them because of reported misconduct by a fellow physician, thereby infringing upon their rights to free speech and due process. The district court granted defendant hospital's motion for summary judgment on the grounds that suspension of a physician's medical staff privileges do not support a claim under 42 U.S.C. § 1983. Reversed.

The court of appeals held that the hospital was a public institution,

and that its suspension of appellants' medical staff privileges could constitute the requisite state action needed to support a § 1983 claim.

*Equal Employment Opportunity Commission v. Cargill*, 855 F.2d 682

Appellee Cargill maintains a life insurance benefits plan that treats employees age 60 and over differently than younger employees. The plan was instituted years before the passage of the Age Discrimination in Employment Act (ADEA). Appellant Equal Employment Opportunity Commission (EEOC) sued Cargill alleging the plan violated the Act. The district court granted Cargill's motion for summary judgment. Affirmed.

The court of appeals affirmed, holding that Cargill's plan was exempt from the ADEA because it had been in existence prior to the act's passage. For this reason, the court noted Cargill's plan could not be a subterfuge to evade the ADEA.

*Meade v. Grubbs*, 841 F.2d 1512

Appellant Meade had been arrested and placed in a city jail. Meade requested medical attention and was told he would have to wait until he arrived at the county facility. At the county facility, Meade alleged he bent over to avoid passing out and was kicked by a deputy sheriff, appellee Grubbs. Appellant then filed, pro se, a § 1983 action against Grubbs, his supervisor, the agency which trained him, and the county commissioners. Grubbs and the other defendants filed a motion to dismiss, to which Meade responded to with a motion for an extension of time in which to file. The district court denied the motion for an extension of time, and dismissed the action with prejudice. Affirmed in part, reversed in part, and remanded.

The court of appeals noted that to dismiss a cause of action with prejudice was a severe sanction reserved for extreme circumstances. In this case, there was no showing that the defendants were prejudiced by Meade's failure to comply with the local rule, and as a result, such a severe sanction was unwarranted in this instance.

The court also held that if Meade's allegations of excessive force were true, sufficient grounds for a valid constitutional claim existed against not only Deputy Grubbs, but also his supervisor and the agency that trained him. But the court held that the County Commissioner could not be properly joined in this cause of action, since they had no statutory controls over the deputies.

*Vasquez v. Cooper*, 862 F.2d 250

Petitioner, prior to being convicted and sentenced, spent 284 days in jail because he was indigent and unable to post bond. The district court denied petitioner's petition for writ of habeas corpus, in which he asserted that the judge improperly refused to credit his sentence for the time he spent in custody prior to sentencing. Petitioner appealed to the

Tenth Circuit, asserting that his equal protection rights had been violated in that his indigency resulted in a greater sentence than would have been imposed on a wealthier person.

The Tenth Circuit affirmed. In holding that petitioner's equal protection rights were not violated, the court found that petitioner did not show that he is a member of a class denied a benefit that is available to others similarly situated. Petitioner's arguments erroneously assumed that only indigents are unable to post bond. Furthermore, the court found that the judge had considered petitioner's pretrial confinement in setting the sentence, which placed petitioner in the same position as those released on bail. The court also held that due process fairness was met by the judge's consideration of petitioner's presentence confinement in setting the sentence, which is within the statutory limitation for his offense.



